

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

March 4, 1996

ASARCO, INCORPORATED,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. CENT 95-8-RM
v.	:	Citation 4444361; 9/20/94
	:	
	:	Docket No. CENT 95-9-RM
SECRETARY OF LABOR,	:	Citation 4328815; 9/21/94
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Sweetwater Mine
Respondent	:	Mine I.D. 23-00458
	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 95-122-DM
on behalf of	:	
DAVID HOPKINS,	:	Sweetwater Mine
Complainant	:	
Mine I.D. 23-00458	:	
v.	:	
	:	
	:	
ASARCO, INCORPORATED,	:	
Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor and David Hopkins; Henry Chajet, Esq., and M. Shane Edgington, Esq., Patton and Boggs, Washington, D.C. and Denver, Colorado, for Asarco, Inc.

Before: Judge Manning

These cases are before me on (1) notices of contest filed by Asarco, Inc. ("Asarco") against the Secretary of Labor and his Mine Safety and Health Administration ("MSHA") under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.(1988)("Mine Act"); and (2) a complaint of discrimination brought by the Secretary of Labor on behalf of

David Hopkins against Asarco under section 105(c) of the Mine Act. For the reasons set forth below, I find that Mr. Hopkins was discriminated against in violation of 105(c) of the Mine Act, and I affirm the two citations.

David G. Hopkins filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2). MSHA investigated the complaint, concluded that Asarco had violated the provisions of section 105(c)(1), and brought this discrimination action. During the course of its investigation, MSHA issued two citations. Asarco challenged these citations in the two contest proceedings.

A hearing was held in these cases in Rolla, Missouri. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT

Asarco operates the Sweetwater Mine, an underground lead and zinc mine in Reynolds County, Missouri. The mine produces about 1.3 million tons per year and employs about 90 hourly workers and 9 salaried employees underground. (Tr. 774). The mine uses a standard room and pillar mining method. The roof (back) is generally 16-18 feet high, but in some areas the roof can be up to 60 feet high. (Tr. 775). In order to reduce the risk that miners and equipment will be struck by falling rock, the walls and roof of the mine are periodically scaled with a scaling bar to remove loose and weak rock. In areas where the roof is high, miners must get into the basket of equipment that is capable of raising them to a sufficient height to scale down any hazardous rock. The incident that gave rise to this discrimination case centers around a piece of equipment known as the 1311 High Scaler (the "high scaler"), which is described below.

Mr. Hopkins was employed by Asarco at the Sweetwater Mine starting in February 1993. He had previously worked two years underground for another mining company. He started at Sweetwater as a laborer in the West end of the mine. He was subsequently transferred to the South end as a powderman. Finally, he was transferred back to the West end of the mine as a powderman. His supervisor was Douglas Swarengin, Shift Foreman.

The powdermen on a crew are responsible for all explosives work on that shift. Because that work does not take the full shift, powdermen are also responsible for scaling down loose rock, as assigned by their supervisor. Scaling is a major part of a powderman's job. Mr. Hopkins was frequently assigned to

scale areas of the mine by Mr. Swearengin. In general, there were two powdermen on Mr. Hopkins' shift and they worked as a team on all assignments including scaling.

In most areas of the mine the roof is between 16 and 18 feet above the mine floor. In those areas, scaling is performed from the floor or from mobile equipment such as a Getman low scaler. In some areas, however, the roof is 60 feet above the mine floor. In those areas scaling must be performed from the basket of a high scaler. The high scaler involved in this case is a large vehicle equipped with a two-part boom that operates like scissors to raise and lower the basket. The boom also swivels on a turntable so that the basket can swing from side to side. The high scaler functions much like a cherry picker used by power companies, but is larger. Once the high scaler is moved into position and the outrigger jacks are set, the two miners who are going to scale get into the basket. The basket contains controls to raise and lower the boom and to operate the turntable. One miner operates the controls and the other miner bars down loose rock with a metal bar.

The first time Mr. Hopkins was asked to high scale was with Thomas "Rick" Huggins soon after he began working at the mine. They used a smaller high scaler, No. 1307, with controls that are of a different type from the No. 1311. (Tr. 740). The boom had to be fully extended to reach the back and when they came down the boom started jerking. The basket dropped about 10 feet and bounced. (Tr. 95, 741). Mr. Huggins looked at Mr. Hopkins and laughed. Id. Mr. Hopkins became concerned about his safety and wondered if Mr. Huggins bounced the basket on purpose to scare him. (Tr. 96). Mr. Huggins testified that he has a nervous laugh and that the basket jerked because the boom of the small high scaler bounces when you bring it down from such a high level. (Tr. 741).

Mr. Hopkins did not high scale again until he returned to the West end as a powderman. He scaled while Jerry Williams operated the controls of the 1311 high scaler. Mr. Hopkins testified that the high scaler rocked slightly, but that it was otherwise a "fine experience." (Tr. 96). Starting sometime in July 1994, Mr. Hopkins began telling other miners during lunch that he would not high scale. He told other miners that he was afraid of heights and that it terrifies him to get into a machine that rocks. (Tr. 98). Mr. Hopkins testified that he was scared of the high scaler, in part, because of the stories he had heard about it. He stated that miners on his crew told him that the high scaler fell over once when the mine was owned by a different mine operator and that sometimes guys talked about "getting some-

body in there and giving them a ride...." (Tr. 99-100). He had also heard that the basket once became stuck against a rib and miners had to climb down on a rope. (Tr. 101).

In July 1994, Mr. Huggins, who sometimes filled in for Mr. Swearengen, discussed the high scaler with Mr. Hopkins. Mr. Huggins testified that he ordered Mr. Hopkins to high scale and that he refused. (Tr. 750-52). Mr. Huggins said that he sent a note to Michael Mutchler, underground manager at Sweet-water, stating that Mr. Hopkins refused to highscale. Mr. Mutchler testified that he never received such a note, but that he remembers the incident. (Tr. 794). Mr. Hopkins testified that he discussed the high scaler with Mr. Huggins, but that he did not understand that he was being ordered to high scale. (Tr. 102-04).

On the morning of August 4, 1994, Mr. Hopkins was called in to Mr. Mutchler's office to discuss the high scaler. Mr. Mutchler testified that he called the meeting because Mr. Swearengen advised him that Mr. Hopkins had been bragging to the crew that he would not operate the high scaler. (Tr. 794-95). Owen Erickson, Safety Manager; Kenneth McCabe, General Mine Foreman; Larry Hampton, miners' representative; and Mr. Swearengen were also present at the meeting. Mr. Mutchler asked Mr. Hopkins why he was telling crew members that he would not operate the high scaler. Mr. Hopkins replied that he felt that the high scaler was old and unsafe to operate. (Tr. 108, 795-96). Mr. Mutchler asked Mr. Hopkins to list the specific safety problems he had with the high scaler and Mr. Hopkins could not do so. (Tr. 796). Mr. Hopkins said that the basket rocks and sways when you operate it and that he had heard stories about past accidents. (Tr. 181). Mr. Mutchler explained that the high scaler recently had major preventive maintenance work performed on it and that other miners told him that it was in good condition. (Tr. 796-97). Mr. Mutchler told Mr. Hopkins that high scaling was part of his job and that unless Mr. Hopkins had a specific safety complaint that could be addressed, he would be expected to high scale. (Tr. 799).

Mr. Hopkins also told Mr. Mutchler that he was afraid of heights. (Tr. 232, 797). Mr. Mutchler said that he would transfer him to the South end where high scaling is not a part of a powderman's day-to-day job. (Tr. 110, 798). Mr. Hopkins did not believe that he had to respond to the offer to transfer at that time so he did not immediately accept the offer. (Tr. 110-11). During the meeting, mine management said that they would have MSHA inspect the high scaler to get a "third-party opinion" about the safety of the machine. (Tr. 798). After the meeting,

Mr. Erickson called the local MSHA office and was advised that MSHA would not inspect the mine without a specific complaint being filed by a miner.

After he went underground on August 4, Mr. McCabe told Mr. Hopkins that he could not transfer to the South end. (Tr. 111, 855-56). Near the end of the shift Mr. Swearengin and Mr. McCabe approached Mr. Hopkins, and McCabe told Hopkins that he was nothing but a pain in the ass and that he had another meeting in Mr. Mutchler's office at the end of the shift. (Tr. 112). Mr. Hopkins believed that the meeting was held so that management could "flex ... their muscles." (Tr. 112-13). Mr. Mutchler told Mr. Hopkins that high scaling was part of his job and that unless he could point to a specific safety problem on the high scaler, he would be expected to high scale. (Tr. 801). At 5:00 p.m., the end of Mr. Hopkins shift, Hopkins told Mr. Mutchler that unless he was paid overtime, he would leave the meeting. (Tr. 113, 185-88, 802). The meeting ended abruptly. Mr. Mutchler believed that Mr. Hopkins was belligerent and uncooperative at the two meetings. (Tr. 799).

On August 31, MSHA Inspector Robert Seelke inspected the mine. During the inspection, Erickson and Hampton asked him to closely examine the high scaler. Mr. Hopkins was asked to accompany Inspector Seelke so that he could discuss his safety concerns with the inspector. (Tr. 28-29). Mr. Hopkins refused the offer because he did not want to stir up any more trouble and he thought that the company would be "courteous enough" not to make him high scale. (Tr. 29, 115). Inspector Seelke inspected the high scaler and did not issue any citations.

On September 8, Mr. Hopkins and David A. Hooper were assigned to high scale by their supervisor, Doug Swearengin. Mr. Hopkins performed a preshift examination on the high scaler. He found what he believed to be several safety defects: a hole in the boom, a hydraulic leak in a metal tube inside the upper part of the boom, smashed hoses at the knuckle of the boom where the upper and lower booms pivot, a dent in the boom, play in the turntable for the boom, and a defective emergency relief valve. (Tr. 119-23, 347). Hopkins and Hooper told the mobile maintenance crew about the safety problems. Mechanic Rick Stevens told them that he was working on a drill and that he would come and look at the high scaler as soon as he was finished. (Tr. 124, 78-79, 348).

Before mobile maintenance arrived to look at the high scaler, Mr. Swearengin returned and asked Hopkins and Hooper why they were not high scaling. They replied that they were waiting

for maintenance to check out problems they had found. Hopkins briefly described the problems he had found on his preshift. (Tr. 130, 368). Mr. Swearengen told Hooper and Hopkins to get on his tractor. He then drove them to a powder magazine and told them to wait there until he returned. (Tr. 130, 368-69).

About a hour later, Mr. Swearengen returned to the powder magazine and told the miners to get on his tractor. He took them back to the high scaler and told them that the high scaler had been checked out and to start high scaling. (Tr. 131, 352). Mr. Hopkins replied that he would be the judge of that because he was the one going up and he did not know what had been done to repair the high scaler. Id. At that point, Hopkins and Swearengen began inspecting the machine. The high scaler was started and Hopkins looked to see if the hydraulic leak had been repaired. Hopkins testified that he saw the same V-shaped spray of hydraulic fluid coming from inside the boom as he saw when he pre-shifted the high scaler. (Tr. 132). Hopkins testified that he believes that Mr. Swearengen saw the hydraulic leak because he told Hopkins to go ahead and ride it and assured him that it would not fall because it has check valves. Id. Hooper and Mutchler testified that Swearengen could not see the hydraulic leak. (Tr. 371, 825).¹

Mr. Swearengen explained to Mr. Hopkins that hydraulic fittings had been tightened and that it was safe to operate. (Tr. 282-87, 743-45). Mr. Swearengen showed Hopkins how to use the emergency relief valve and explained that the hole and dent in the boom had always been there and did not present a hazard. (Tr. 370). He also explained that the play in the turntable did not create a safety hazard. Id.

Hopkins continued to refuse to operate the high scaler principally because he believed that the hydraulic line was still leaking inside the boom. Swearengen kept on saying that he did not see the leak, but Hopkins did not believe him. (Tr. 136-37, 227-28, 371, 825). Mr. Hopkins believed that the high scaler was unsafe to operate and he refused to operate it. (Tr. 133-34, 352-53, 815-16).

After Hopkins and Swearengen argued for a while, Swearengen told Hopkins and Hooper to shut down the high scaler and to get on the tractor because he was taking them to another section to low scale. As they were getting on the tractor, Hopkins asked Swearengen to give his word that nobody else would run the high scaler because it was not safe to operate. Swearengen replied

¹ Mr. Swearengen did not testify at the hearing.

that it was none of his business and they argued further. Swearengin took them to the section where Huggins and Garry Moore were low scaling. He told Huggins to get on the tractor and took them to the shaft. At the shaft, Hopkins told Swearengin that if the leak was fixed he would operate the high scaler. (Tr. 134-35). Hooper told Swearengin that he did not want to go to the top. (Tr. 355, 760).² Swearengin escorted Hopkins into the elevator and took him to the surface. Id. One the way up, Hopkins and Swearengin argued further about the leak in the hydraulic line and Hopkins called Swearengin a liar because he believed that Swearengin saw the leak but would not admit it. (Tr. 136-37). At the top Hopkins was escorted off of the property after he called his wife to come pick him up. (Tr. 137-38). On September 12, Hopkins met with Mutchler and Erickson at the mine. Hopkins was informed that he was being terminated from his employment for an improper work refusal and interference with management. (Tr. 835-36, 841).

While Hopkins, Hooper, Huggins, and Swearengin were at the shaft on September 8, Hopkins told Huggins how to find the hydraulic leak in the boom. (Tr. 745-46). Huggins went back and looked for the leak, but could not find it. Id. He operated the high scaler on September 8, after Hopkins refused to operate it, without any problem. (Tr. 746). On September 21, Randall Blount, a mechanic, found a leak in the same location as the leak described by Hopkins. (Tr. 296-98, 304-05). He testified that the hydraulic line leaked only when you moved a particular lever on the controls to a certain position. (Tr. 297-98). Mr. Huggins testified that he observed a leak on September 21 "right where David [Hopkins] said there was a leak." (Tr. 746-47). He had to get on a ladder to see it. Id.

Hopkins filed a discrimination complaint with MSHA on September 16. In his complaint, he alleged that: (1) a hydraulic hose or metal line inside the boom was leaking hydraulic fluid and that other hoses were dripping fluid at the knuckle; (2) a hole was present in the boom about 10 to 15 feet from the basket that had been cut with a torch; (3) the emergency valve would not let the basket down; (4) and the turntable of the boom had one inch of play. (Ex. R-3).

On September 19, 1994, MSHA Inspector Michael Roderman inspected the high scaler for about three hours looking for safety problems described in a safety complaint, including the hydraulic leak in the boom. (Ex. P-15). He did not issue any

² Hooper believed that the hydraulic leak was a routine leak that did not present a hazard. (Tr. 354-55, 372).

citations on that day, but on September 21 issued Citation No. 4328815 alleging a violation of 30 C.F.R. § 57.1400(b). The citation is five pages long and discusses each of the allegations raised by Mr. Hopkins. (Ex. P-14). In particular, the citation states that: (1) the high scaler had two holes in the metal hydraulic line inside the upper boom near the knuckle; (2) a 2½ inch by 3 inch hole had been cut in the upper boom; and (3) a section of the bottom side of the upper boom was bent as a result of contact with the top frame of the outrigger jacks. Id. In addition, the citation alleges that the emergency rotation ("swing") motor for the turntable was missing. Id. Inspector Roderman determined that the alleged violation was not significant and substantial.

On September 20, 1994, Ms. Judy Peters, an MSHA Special Investigator, was at the mine to talk with Mr. Erickson about Mr. Hopkins' dismissal. While she was at the mine, she observed two compressed gas cylinders in a hallway that were not secured in any manner. (Tr. 599). She issued Citation No. 4444361 alleging a violation of 30 C.F.R. § 56.16005. She determined that the alleged violation was not significant and substantial.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. DISCRIMINATION PROCEEDING (CENT 95-122-DM).

Section 105(c)(1) of the Mine Act protects miners from retaliation for exercising rights protected under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by the protected activity. Secretary on Behalf of Robinette v.

United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless affirmatively defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. Haro v. Magma Copper Co., 1935, 1937 (November 1982).

It is also well settled that section 105(c) protects "a miner's right to refuse work under conditions that he reasonably and in good faith believes to be hazardous." John A. Gilbert v. FMSHRC, 866 F.2d 1433, 1439 (D.C. Cir 1989)(citations omitted). The Commission has consistently held that "the perception of a hazard must be viewed from the miner's perspective at the time of the work refusal." Id.

1. Protected Activity

I find that Hopkins had a reasonable good faith belief that the high scaler posed a hazard to his safety. His primary concern was the hydraulic leak that he observed inside the upper boom of the high scaler. He also was concerned about the hole in the boom.

With respect to the hydraulic leak, Hopkins was concerned that the basket could drop or could swing against a pillar. (Tr. 120). Asarco questions whether this leak existed since Swaengren and Huggins could not find it on September 8. I credit the testimony of Hopkins. Blount testified that he found a leak in the same location on September 21. (Tr. 296-98, 304-05). Huggins also testified that he saw the leak on that date. (Tr. 746-47). Because the hydraulic line leaked only when the basket was moved in a certain direction, it was not easy to detect.

With respect to the hole in the boom, Hopkins was concerned that the area was "taking weight" because the top of the hole was "pooched out." (Tr. 121). Asarco contends that the hole did not present a safety problem and points to the fact that the high scaler had been operated safely for years with this condition. It also states that other miners had observed the hole in the boom and were not concerned that it presented a safety hazard. Indeed, it notes that Inspector Seelke did not issue a citation on the high scaler and Inspector Roderman testified that he would have operated the high scaler after he inspected it on September 20. (Tr. 483-84, 486-87). I find, however, that Hopkins' perception of a hazard was reasonable despite the fact that the hole was not new. Indeed, I note that Asarco's expert witness, Kenneth Lau, testified that when he first saw the high scaler,

he was concerned about the hole because of its sharp corners. (Tr. 713, 723, 727).

Asarco relies on National Cement Co. v. FMSHRC, 27 F.3d 526, 533 (11th Cir. 1994), for the proposition that "[i]f the work refusal is not objectively reasonable, there is no protected activity." In that case, however, the miner continued his work refusal after the operator suggested an alternative means to perform his work. The administrative law judge found that this alternative means was not unsafe, but held that the miner had engaged in protected activity. I interpret the Eleventh Circuit's decision to mean that a Commission judge should continue to view the hazard from the miner's perspective, but that an irrational or groundless fear cannot be the basis for protected activity because it is not "objectively" reasonable. In the instant case, I find that Hopkins' perception of the hazards was "objectively" reasonable. His perception of the hazard was not so groundless or irrational as to fail an objective test.

I also find that Hopkins' work refusal was made in good faith. Immediately following his preshift examination, Hopkins asked the mobile maintenance crew to check out the items that were of a concern to him and Mr. Hooper. Miners often ask mobile maintenance to examine equipment that needs repair, particularly if the miner's immediate supervisor is not present. (Tr. 54, 274-75, 284, 350, 399, 749). Swearegin was making his rounds at the time of Hopkins' preshift examination. Hopkins communicated his concerns to Swearegin when he returned to the section.

I have taken into consideration the fact that Hopkins was afraid of heights. A miner's refusal to work at a high location solely because of a fear of heights is not protected under the Mine Act because he does not have a good faith belief that the work is hazardous. In addition, such a work refusal would not be reasonable because it would not pass the Eleventh Circuit's objective test in National Cement. I find, however, that Hopkins' refusal to work was based on the safety problems he observed during his preshift examination. Hopkins told the crew on a number of occasions that he did not want to work on the high scaler. He even bragged that he would not do so. I believe that he made these statements because of his fear of heights and because he was afraid of the high scaler as a result of his experience and the stories he had heard about it. Nevertheless, he testified that he would have high-scaled on September 8 if the hydraulic leak was repaired. (Tr. 135, 245). I credit this testimony. He told at least one other miner that he would high

scale in order to keep his job. (Tr. 305-06) Thus, his work refusal on September 8 was motivated by his safety concerns.³

A miner's work refusal is not protected if the operator addresses his safety concerns "in a way that his fears reasonably should have been quelled." Gilbert, 866 F.2d at 1441. Asarco contends that it went to great lengths to address Mr. Hopkins' safety concerns. It points to the two meetings of August 4 at which Hopkins was asked to describe his safety concerns with the high scaler. It also refers to the fact that Hopkins was invited to accompany Inspector Seelke during his inspection of the high scaler on August 31. In addition, Mr. Swearengen inspected the high scaler with Hopkins on September 8 and Mr. Huggins inspected it after Hopkins and Hooper were transported to the powder magazine. Asarco argues that in each instance it attempted to address Hopkins' fears. Asarco argues that Hopkins acted unreasonably because he did not provide any specific safety concerns at the August 4 meetings, he refused to inspect the high scaler with the MSHA inspector and he continued to refuse to operate the high scaler after his concerns were addressed by Swearengen.

Asarco was diligent in attempting to discover why Hopkins was concerned about the high scaler. I credit Asarco's evidence that the Sweetwater Mine encourages miners to raise safety complaints and that management attempts to address these safety concerns. Indeed, the mine has never had a discrimination claim under the Mine Act prior to this case. (Tr. 786-87). In the particular facts of this case, however, I find that Swearengen did not address Hopkins' safety concerns "in a way that his fears reasonably should have been quelled" Gilbert, 866 F.2d at 1441.

Asarco relies on the Commission's decision in Secretary ex rel. Bush v. Union Carbide Corp., 5 FMSHRC 993 (June 1983) in making its argument. In that case, the Commission held that

³ Asarco argues that Hopkins' work refusal was not based on his safety concerns because he testified that he had decided that he would not high scale before he preshifted the machine. (A. Br. 9; A. Reply Br. 2). Hopkins testified that before he preshifted the high scaler on September 8, he "already knew what was wrong with it." (Tr. 245). He went on to testify that he had previously decided that he would not high scale if the problems he believed existed "weren't corrected." Id. He further stated that he would have operated the high scaler if the hydraulic line had been fixed. Id. I do not interpret this testimony to mean that Hopkins had decided that he would not high scale under any circumstances. His apprehension was rooted in his concerns about the safety of the machine.

where "the necessary communication between the miner and operator has occurred and management has taken corrective measures at some point repetition of the same complaint and work refusal loses the protection of the Mine Act." 5 FMSHRC at 998. There are two significant differences between that case and the instant case. First, the operator had totally corrected the condition that prompted Mr. Bush's work refusal. Id. Mr. Bush could not articulate any further safety problems. Second, Mr. Bush made it quite clear that he would not perform his assigned task under any circumstances. As stated above, Hopkins believed that the leak in the hydraulic line had not been corrected and he told Swearengin that he would operate the high scaler if the leak was fixed.

Although mine management tried to get Hopkins to explain his concerns at the August 4 meetings, Hopkins saw the meetings as an opportunity for management to "flex ... their muscles." (Tr. 112-13, 188). He believed that he was being "hammered" by management for raising concerns about the high scaler and that he had been "drug [into these meetings] five against one." (Tr. 188, 232).⁴

When Hopkins and Hooper discovered the hydraulic leak and the other safety items during the preshift examination on September 8, they sought the aid of the maintenance crew. When Swearengin discovered that Hopkins and Hooper had asked the maintenance crew to look at the high scaler, Swearengin took Hopkins and Hooper to a powder magazine and told the maintenance crew not to look at the high scaler. Instead, Mr. Huggins, a miner with extensive experience with the high scaler, examined the machine. Huggins, by his own admission, had no mechanical experience and testified that if he had a mechanical problem he would have a mechanic look at it. (Tr. 748-49)

After Hopkins and Hooper were brought back to the high scaler, they were told that it had been "checked out" and that they should high scale. Hopkins was genuinely apprehensive. He did not understand why he had been made to sit in a powder magazine for over an hour and he did not know what if anything had

⁴ I do not understand why Hopkins did not take the opportunity to express his concerns to Inspector Seelke on August 31. He testified that he believed he would get in trouble and have to attend more meetings if he pointed out problems to the inspector. (Tr. 29, 115). While Hopkins may have been required to attend more meetings, the record does not indicate that Asarco would have disciplined him for actively participating in the inspection. Nevertheless, his failure to participate is not fatal to his discrimination complaint.

been done to correct the perceived safety problems. He did not know who, if anyone, had examined the machine. There is no dispute that Hopkins and Swearengen did not get along. The witnesses testified that there was a personality conflict between them. When Hopkins showed Swearengen the leak in the hydraulic line, Hopkins believed that Swearengen saw it but was not concerned about it.

Asarco contends that it was within Swearengen's authority to have Huggins examine the high scaler in lieu of a mechanic. It maintains that mobile maintenance was busy with other work, and supervisors have full authority to respond to safety complaints and to release equipment into production after the complaint is checked out. Although the record establishes that Swearengen did have such authority, that fact does not resolve the question. The witnesses testified that a mechanic frequently examines equipment in such circumstances. (Tr. 39, 54-56, 70, 79-80, 274-75, 284, 350, 399, 749). It is highly unusual for a supervisor to take a miner away from his work station to wait for a hour in a powder magazine after safety problems are raised. Moreover, after Hopkins was brought back to the high scaler, he observed the same leak in the hydraulic line and he was not told what had been done to correct the problems he reported. Accordingly, Hopkins' fears were not reasonably quelled.⁵

At first, Swearengen offered Hopkins and Hooper alternative work. When Hopkins asked Swearengen to give his word that other miners would not use the high scaler, Swearengen took Hopkins and Hooper to the mine shaft, instead. Hooper agreed to go back and high scale, but Hopkins continued to insist that the high scaler was not safe. Asarco contends that Hopkins' insistence that other miners not use the high scaler until his safety concerns were addressed is not protected under the Mine Act. It maintains that Hopkins was taken out of the mine only after "he refused to allow Swearengen to let another miner operate the high scaler until he cleared it." (A. Br. at 16). In Consolidation Coal Co. v. Marshall, 663 F.2d 1211, 1219 (3d Cir 1981), the court held that "the Mine Act does not provide for the right to shut down equipment so that other miners may not work." (emphasis in original). The court held that the complainant's termination did not

⁵ As discussed above, Hopkins also described other hazards: hoses dripping hydraulic fluid at the knuckle, a defective emergency relief valve, and play in the turntable. I find that these items were either repaired by Asarco after Hopkins pointed them out or were addressed by Asarco in such a way that his fears reasonably should have been quelled. In addition, Hopkins was willing to operate the high scaler with the hole in the boom.

violate the Mine Act because "no one has the right to stop others from proceeding to work if they so wish." Id.

In Consolidation Coal, the complainant, David Pasula, shut down a continuous miner and prevented the only other qualified miner on the shift from operating it. Thus, he shut down all coal production on the section. In addition, Pasula refused his right to have a safety committeeman evaluate the hazard. Id. at 1120. It was only after he refused all other options and he shut down the machine that he was taken out of the mine. Id. at 1120-21. In the present case, Swearengin ordered Hopkins and Hooper to shut down the high scaler. Although Hopkins asked Swearengin to give his word that no other miner would high scale, he did not prevent anyone else from using it. It was Swearengin not Hopkins who had the authority to assign work. Other qualified miners were willing and able to high scale. Thus, Asarco's argument that Hopkins "refused to allow Swearengin to let another miner operate" the high scaler is not supported by the record. Swearengin could have simply said "no" to Hopkins' request.

2. Motivation for Hopkins' Dismissal

Hopkins was terminated, at least in part, for his protected activity. Mr. Hooper was taken to the shaft along with Hopkins for his refusal to work in the high scaler. When Hooper agreed to high scale, he was not taken to the surface for disciplinary action. Hopkins continued his refusal to work in the high scaler because of the hydraulic leak and was terminated. Thus, his termination was motivated at least in part by his protected activity.

The issue is whether Asarco was also motivated by Hopkins' unprotected activity and would have terminated him in any event for these unprotected activities. Mr. Mutchler, the underground manager, testified that Hopkins was not terminated for his alleged safety concerns but was terminated for refusing to do his normal work without a valid reason and interfering with Swearengin's operation of his crew. (Tr. 841-42, 878).

It is true that Hopkins refused to do his normal work, scale loose rock, but his refusal was a direct result of his belief that the high scaler was unsafe to operate. Mutchler and Swearengin did not consider the high scaler to be unsafe and, therefore, characterize his work refusal as insubordination. Mr. Mutchler believes that Hopkins was malingering because he did not want to high scale. Thus, in Mr. Mutchler's mind "there was no relationship whatsoever" between Hopkins' safety concerns and his termination. (Tr. 842). I have determined that Hopkins had

a reasonable, good faith belief that the high scaler was unsafe to operate. Mr. Mutchler and Swearengin had knowledge of Hopkins' safety concerns but did not take the necessary steps to quell his concerns, as discussed above. Thus, I find that there was a direct relationship between Hopkins' safety concerns and his dismissal by Asarco.

Asarco asserts that it would have terminated Hopkins solely for his unprotected activity. First, it contends that Hopkins was terminated for refusing to allow Swearengin to put other miners on the high scaler. As discussed above, Hopkins was not in charge and did not "refuse to allow" anyone else to high scale. Second, Asarco contends that Hopkins repeatedly called Swearengin a liar on September 8 and that such insubordination was not protected. There is no question that Hopkins called Swearengin a liar at least twice because Hopkins believed Swearengin saw the leak in the hydraulic line but would not admit it. Bad mouthing a supervisor is not protected under the Mine Act. (See, for example, my decision in Sorensen v. Intermountain Mine Services, 17 FMSHRC 145 (February 1995)). I find, however, that Hopkins was not fired because he called Swearengin a liar. Employees sometimes became emotional during disputes with a supervisor and Hopkins was known to be rather hotheaded. Hopkins would not have been fired for this conduct alone. I find that Asarco has not established that it would have discharged Hopkins for his unprotected activity.⁶

3. Remedy

Although he was employed at the time of the hearing, Hopkins testified that he might want to be reinstated because his current job may only be temporary. (Tr. 909). He was not sure that he would seek reinstatement if he prevailed in this proceeding. Id. Asarco contends that reinstatement should not be awarded because Hopkins stole the September 8 preshift examination card for the high scaler. Hopkins admitted that he took the preshift examination card when he left the mine on September 8. (Tr. 212-13). Apparently it was in his pocket when he was escorted from the mine. He later gave it to MSHA and it was not returned to Asarco until the discovery phase of this case. Theft of company property is grounds for dismissal at the Sweetwater Mine. (Tr. 779-80).

⁶ Mr. Mutchler also testified that he took into consideration Hopkins' work history, including incidents involving cutting fuses too short and distributing religious literature after being instructed not to. I find that he would not have been discharged for these unprotected activities.

In making this argument, Asarco relies on the Supreme Court's decision in McKennon v. Nashville Banner Pub. Co., 115 S.Ct. 879 (1995). In that case, the employer discovered during discovery that the plaintiff in an age discrimination case had copied confidential documents that disclosed financial information about the company. It sought to have the case dismissed for the theft. The Supreme Court held that after-acquired evidence of the employee's theft did not bar the age discrimination suit, but held that it had a bearing on the remedies available. Specifically, the Court ruled that reinstatement would be inequitable because the employee would have been terminated in any event for the theft.

The facts in McKennon are different from the case presented here. There is no evidence that Hopkins' theft of the preshift card was anything but inadvertent. He had it in his pocket when he was escorted from the mine. It is understandable that an employee would forget such a card when he believes that he is being fired. He testified that he did not think it had any value to the company because it did not contain any production information. (Tr. 212-13). (That information is added at the end of the shift.) It did contain a list of the problems he found on the high scaler. (Ex. P-4). In McKennon, however, the employee admitted that she took the confidential information in the months prior to her discharge to protect herself in case she was fired on the basis of economic necessity. Thus, the employee in McKennon intentionally took confidential information from her employer. There is no evidence that Hopkins intentionally stole Asarco's property. "Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on these grounds alone if the employer had known at the time of discharge." McKennon, 115 S.Ct. at 886-87. A miner who inadvertently walks off with a preshift examination card would not be terminated by Asarco. Moreover, if Hopkins had not been terminated, it is unlikely that he would have taken the card. Accordingly, reinstatement is not barred by McKennon.

B. CONTEST PROCEEDINGS (CENT 95-8-RM & CENT 95-9-RM).

1. High Scaler Citation

Citation No. 4328815 alleges that the following four defects affecting safety were present on the high scaler: (1) a leak in the hydraulic line inside the upper boom near the knuckle; (2) a 2½- by 3-inch hole in the upper boom; (3) a dent in the upper

boom; and (4) a missing emergency swing motor for the turntable. (Ex. P-14). The citation alleges a violation of 30 C.F.R. § 57.14100(b) which provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." Inspector Roderman determined that the violation was not significant and substantial.

For the reasons discussed below, I find that the Secretary has not established that the hole and the dent in the upper boom were defects that affected safety. I also find that the Secretary failed to establish that an emergency swing motor was missing from the high scaler. I find, however, that the hydraulic leak in the upper boom affected safety and that this defect was not corrected in a timely manner to prevent the creation of a hazard.

Inspector Roderman did not observe the leak in the hydraulic hose when he inspected the high scaler on September 19. (Tr. 445). He spent a considerable amount of time looking for the hydraulic leak described in the complaint. (Tr. 477-78, 545) He did not see the leak on September 21 when he returned to the mine. (Tr. 445). Roderman testified that an hourly maintenance employee approached him when he arrived on September 21 and said that the leak he had been looking for had been found. (Tr. 446, 543-44). The leaking hydraulic line had been repaired sometime before the inspector arrived by bypassing it with a new hydraulic hose. (Tr. 298-300, 446). The miner described the V-shaped spray but could not say how long the leak had been there. (Tr. 446). Huggins and Blount also saw the leak on September 21. The leaking line controlled the rotation of the turntable for the boom. Inspector Roderman was concerned that the leak could cause the basket to "swing around and overturn, ... [or] hit a pillar or rib and maybe throw someone from the basket." (Tr. 448).

Inspector Roderman testified that, in general, one would expect to see a leak of the magnitude described by the mechanic who reported it to him on September 21. (Tr. 553-55, 560). He stated that he looked for the leak on September 19 while the boom was in motion, but that he was not inspecting for leaks when the turntable was moved from side to side. (Tr. 553, 585). Inspector Roderman does not know when the leak occurred. (Tr. 545, 569). He assumed that the leak that was found on September 21 was the same leak that Hopkins saw on September 8 because it had the same V-shaped spray and was in the same location. (Tr. 570-71).

I credit the testimony of Roderman, Blount, and Huggins that a hole existed in the hydraulic line on September 21, 1994. I also credit the testimony of Inspector Roderman and Michael Sheridan, an MSHA engineer, that such a hydraulic leak constitutes a defect that affects safety. (Tr. 448, 647). It is impossible to know how long the leak existed or if it was the same leak that Hopkins saw on September 8. On one hand, there is evidence that such a leak would be readily obvious because it would cause hydraulic fluid to pour out of the upper boom at a fairly steady rate. (Tr. 769). There is also evidence that such a hole can develop in a matter of minutes. (Tr. 312-13). On the other hand, there is evidence that the hole in the hydraulic line only sprayed significant amounts of fluid when the turntable was moved. Charles Walker, a miner at the Sweetwater Mine, testified that he operated the high scaler between September 8 and 21. (Tr. 70-71). He stated that the high scaler "still ran a little hydraulic oil out of the boom, but you still couldn't see [any] leak." (Tr. 71).

Based on this evidence and the record as a whole, I find that the leak was not corrected in a timely manner. I find that it is likely, although far from certain, that the leak had existed since the time Hopkins observed it on September 8. It was difficult to see the V-shaped spray because it was inside the boom and it only sprayed when the controls were operated in a certain manner. Mr. Hopkins and Hooper reported that the boom was leaking on September 8. Walker stated that the boom leaked hydraulic oil at the time he operated it. Garry Moore and Huggins checked the boom for leaks while Hopkins and Hooper were at the powder magazine on September 8. They testified that they found a leak in the boom but fixed it by tightening a fitting. (Tr. 282-83, 744-46). It is possible that this repair did not fix the leak. Inspector Roderman did not see the leak on September 19, but stated that the turntable was not moved while he was looking at the boom. In any event, I find that the leak had existed for some length of time.

I recognize that older mining equipment is bound to leak hydraulic fluid.⁷ Minor leaks are to be expected and do not pose a safety hazard. Nevertheless, the leak in the boom was more than a routine leak; it affected safety, and was not timely corrected.

The hole in the boom had existed for as long as anyone could remember. The hole had apparently been cut to facilitate the re-

⁷ The 1311 high scaler had been in operation at this mine since 1974. (Tr. 437).

placement of hydraulic hoses. The Secretary has not established that this hole was a defect that affected safety. Mr. Sheridan, the Secretary's engineer, testified that the hole was not a hazard unless cracks developed around the hole. (Tr. 642, 683). He recommended that the operator monitor the hole for cracks. Neither Sheridan nor Inspector Roderman saw any cracks around the hole and the photographs do not show any cracks. (Tr. 482, 645; Exs. P-6E, P-6F). Kenneth Lau, Asarco's engineer, did not observe any cracks and concluded that it was reasonable for the mine to operate the high scaler with the hole in the boom. (Tr. 704, 711). Inspector Roderman included this allegation in the citation because he was told to by a supervisor in MSHA's Dallas office. (Tr. 448-50, 561-62).

I also find that the dent in the boom did not create a safety hazard. Mr. Sheridan testified that the dent was not a major

distortion and that it did not create a safety risk. (Tr. 684). Mr. Lau did not find any cracks around the dent and concluded that it was reasonable for the mine to operate the high scaler with the dent in the boom. (Tr. 704, 711). When Inspector Roderman saw the dent on September 19, he concluded that it did not create a hazard. (Tr. 487). He included this allegation in the citation only after he talked to a supervisor in MSHA's Dallas office. (Tr. 452).

Finally, I conclude that the Secretary did not establish that the emergency swing motor was missing from the high scaler. Inspector Roderman testified that he believed that the emergency swing motor was missing from the high scaler. (Tr. 454-56). He based his finding, in part, on his experience operating this particular high scaler when he worked for the previous operator of the mine. Id. According to Roderman, this motor allows the boom and turntable to rotate. Mr. Sheridan, in his report, stated that a swing motor was missing. (Ex. P-2). He testified, however, that he did not look for a swing motor. (Tr. 674-75). Mr. Mutchler testified that the high scaler was never equipped with the type of emergency swing motor that Inspector Roderman said was missing. (Tr. 842-49). He further testified that the high scaler was equipped with two motors that can be used to turn the boom and turntable: a hydraulic motor, and an electric motor. Id. Using photographs and other exhibits, he showed where these motors were located. Because these motors were incorporated into the structure of the high scaler, he stated that they were somewhat hidden from view. Id. I credit Mr. Mutchler's testimony in this regard and find that an emergency swing motor was not missing from the high scaler.

2. Compressed Gas Cylinder Citation

On September 20, 1994, Inspector Peters issued citation No. 4444361 alleging a violation of 30 C.F.R. § 56.16005. The citation states, in part: "Two compressed gas cylinders both labeled full oxygen containers were observed lying on the floor beside the mail box in the main office." (Ex. P-3). The citation further states that employees were observed in the area and that she was told that the cylinders were there for less than two hours. (Tr. 599). Section 56.16005 states that "[c]ompressed and liquid gas cylinders shall be secured in a safe manner." Inspector Peters determined that the violation was not significant and substantial.

Asarco did not offer any evidence or argument on this citation. Accordingly, I credit the testimony of Inspector Peters with regard to this matter and affirm the citation.

III. ORDER

A. CENT 95-122-DM

For the reasons set forth above, I conclude that the discharge of David G. Hopkins by Asarco in September 1994, violated section 105(c) of the Mine Act. Consequently, it is **ORDERED** that:

1. Within 21 days of the date of this decision, the parties shall confer in person or by telephone for the purposes of:

(a) stipulating to the position and salary to which Mr. Hopkins should be reinstated at Asarco's Sweetwater Mine, if he seeks reinstatement;

(b) stipulating to the amount of back pay and interest computed from September 9, 1994, to the present, less deductions for unemployment benefits and earnings from other employment;

(c) stipulating to any other reasonable and related economic losses or litigation costs incurred as a result of

Mr. Hopkins' September 1994, discharge.

2. If the parties are unable to stipulate to the appropriate relief in this matter, Complainant shall file, within 40 days of the date of this decision, a proposed order for relief. This proposed order shall be supported by documentation, including check stubs from his prior and current employment, notices of unemployment compensation awards, and bills and receipts to support any other losses or expenses claimed.

3. Asarco shall have 20 days to reply to Complainant's proposed order for relief.

4. Pursuant to 29 C.F.R. § 2700.44(b), the Secretary is urged to file with the Commission, within 45 days, an appropriate petition for assessment of civil penalty for Asarco's violation of section 105(c) of the Mine Act.

5. This decision does not constitute my final decision in CENT 95-122-DM until my final order for relief is entered. Asarco's stipulation of any matter regarding relief shall not waive or lessen its right to seek review of this decision on liability or relief.

B. CENT 95-8-RM

For the reasons set forth above, Citation No. 4444361 is **AFFIRMED**. No civil penalty can be assessed at this time because the Secretary of Labor has not filed a petition for assessment of penalty under 29 C.F.R. § 2700.28.

C. CENT 95-9-RM

For the reasons set forth above, Citation No. 4328815 is **AFFIRMED** as to the allegation concerning the leak in the hydraulic line in the boom of the 1311 High Scaler, and is **VACATED** as to all other allegations. No civil penalty can be assessed at this time because the Secretary of Labor has not filed a petition for assessment of penalty under 29 C.F.R. § 2700.28.

Richard W. Manning
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Henry Chajet, Esq., PATTON BOGGS, 2550 M Street, NW, Washington, DC 20037-1350 (Certified Mail)

M. Shane Edgington, Esq., PATTON BOGGS, 1660 Lincoln Street, Suite 1975, Denver, CO 80264 (Certified Mail)

RWM